

Appendix B: Scoping Report

Alaska Program Amendment Scoping Report

In 2003, the State of Alaska adopted legislation and regulations that made revisions to its federally-approved Coastal Management Program. Pursuant to the Coastal Zone Management Act of 1972, as amended and Office of Ocean and Coastal Resource Management (OCRM) regulations on amendments to approved state coastal zone management programs (15 CFR Part 923, subpart H), state must submit changes to their programs and their enforceable policies to OCRM for approval in order to allow continued federal funding for program implementation and application of federal consistency under the new enforceable policies. The proposed federal action under the National Environmental Policy Act is OCRM's approval of the incorporation of the revised program and its enforceable policies into the Alaska Coastal Management Program.

OCRM published a Notice of Intent to prepare and Environmental Impact Statement on Alaska's request to incorporate HBs 69, 86, 191, SB 102, revisions to statute AS 46, and regulations at 11 AAC 110, 11 AAC 112, and 11 AAC 114 into the ACMP. The public comment period was open until August 5, 2005. OCRM solicited public comment to identify alternatives to approving the amendments to the ACMP, and potential impacts of the proposed alternatives. OCRM held meetings in Barrow on July 25, Anchorage on July 27, and Juneau on July 28, 2005.

During the scoping process, three ways were provided to submit comments to NOAA on approval of the ACMP amendments:

- (1) Open public meetings were held in Barrow, Anchorage, and Juneau, Alaska;
- (2) E-Mail
- (3) Traditional Mail Delivery

Twenty-two people participated in the scoping process. They represented environmental organizations, private industry, and local, state, tribal and federal governments. Comments provided during the public meeting were captured by a court reporter and are provided in full in Appendix D. Approximately half of the participants submitted input at the public meetings, with the other half submitting comments by e-mail or letter. Some commenters submitted through multiple channels. All of the comments originated from Alaska.

The following paragraphs summarize the comments received during the scoping period. The wording is intended to categorize and summarize the substance of the comments, not reproduce the exact wording of individual comments. The order in which the issues are presented is not intended to reflect their relative importance. The summary does not evaluate the comments, nor does it attempt to depict any majority opinions or trends. While some overlap between categories is unavoidable, effort has been made to reduce repetition of issues between categories.

EIS Process: Several commenters stated that the timeline for completing the EIS is “unreasonably” brief, and recommended that the process timeline be extended particularly to meet Environmental Justice requirements. Another commenter stated that an insufficient number of alternatives are being considered, and that additional alternatives should provide more flexibility to coastal districts in developing their enforceable policies.

Purpose of Amendments: Two commenters believed that the proposed amendments would provide substantial improvement to the State’s coastal management program by reducing duplication with existing regulatory authorities and providing for greater certainty in project reviews. Other commenters felt that the State was intentionally revising the program to facilitate development and remove local participation. One commenter stated that the real issue with the speed of the process was the appeals process, rather than application of District policies.

Public Participation: With respect to the public participation process for public participation requirements in submitting a program change to OCRM, several commenters stated that the State did not provide adequate opportunities throughout the program change process for meaningful participation by the general public or coastal districts during development of the regulatory changes. In terms of impacts to future public participation opportunities in administration of the ACMP, commenters identified several areas where they felt the amendments to the ACMP would negatively impact on the ability for the public to provide comments and participate in coastal management decisions. Areas they felt should be analyzed include: (1) the limits that will be experienced when the ABC list of projects to be reviewed for federal consistency is broadened (2) lack of opportunity for public comment for coal bed methane projects now automatically determined to be consistent; (3) removing public challenges for ACMP consistency determinations; (4) removing DEC activities from review via the DEC carve-out provisions; and (5) reducing the opportunity for public participation by reducing the scope of local District programs and their enforceable policies.

Consolidation of Decision Making Authority: Commenters stated that the amalgamation of decision-making authority into DRN has removed several mechanisms that ensure the orderly and balanced utilization and protection of coastal resources, and that the impacts of this should be analyzed in the EIS. Examples of this “concentration” included elimination of CPC, lack of District seats on ACMP Working Group, review of project appeals (elevations) heard by DNR commissioner rather than by three agency commissioners, and moving the ACMP in the Division of Habitat into DNR instead of Alaska Department of Fish and Game. Others referred to it as a “loss of checks and balances.” Several commenters expressed concern that the “due deference” being proposed under the new system will not provide the same critical programmatic link to federal agencies on a wider array of issues that the full District participation has previously.

DEC Carveout: Several commenters stated that separating the review of air and water quality issues from coastal management issues needs to be analyzed, because the current interpretation would remove all air and water quality issues from the consistency review process. Similarly others felt the EIS should include an analysis of the removal of activities regulated by DEC from coordinated consistency review with other statewide standards or local coastal district enforceable policies. It was suggested that because there are many air and quality matters not regulated by DEC, there would be adverse effects to the environment, including activities in the

OCS. They stated that because DEC does not have a permit for OCS activities in federal waters, and the state claims that districts may not have any air or water quality policies, there is no avenue for input into OCS activities. Many commenters stated that oil spills are the major concern of offshore oil and gas projects, and the consistency review will lose most of its meaning if districts and the public cannot address this matter. One commenter suggested that the EIS should analyze DNR's review of several recent projects to fully understand what aspects of air and water quality will no longer be addressed under the new ACMP rules. Finally, one commenter stated that the DEC is currently understaffed and lacks the resources to meet current and reasonably foreseeable permit issuance work loads, and therefore it is incumbent upon NOAA to analyze effects of the proposed ACMP changes on DEC staffing and resource abilities and needs.

Subsistence: Commenters were concerned that approval of the changes to the ACMP will weaken protection for subsistence resources. Example of changes included the removal of the provisions establishing priority for subsistence uses and resources, and ensuring access to subsistence resources. Several commenters raised concerns about the new guidance requiring Districts to designate important habitat and the narrow way the state has been interpreting this guidance to new District policies. Many expressed concern that designating subsistence areas would not be consistent or sufficiently flexible to address the migratory nature of subsistence resources. Other commenters were concerned that the policies will only address subsistence uses, and not the resources themselves, thereby restricting the ability of Districts to write policies addressing the resources. Similarly, commenters expressed concerns that DNR's interpretation of the new ACMP regulations appears to block coastal districts from developing meaningful policies for subsistence uses and resources. Finally, North Slope commenters stated that the removing the local voice of Districts on subsistence, an issue so central to their primary welfare, would threaten to radically disrupt the delicate balance that contributes to both their economic and cultural prosperity.

Impact to Resources: One commenter stated that the new revisions may result in impacts to Bowhead whale management, including the International Whaling Commission reducing subsistence quotas if it appears that increased industrialization may damage in the species' habitat.

Habitat: Commenters expressed concern that modifications to the statewide habitat standards will weaken protection for habitat. Several pointed out that the revised management goals for the majority of habitat types only address nonliving subjects, which they found did not make sense. They pointed out that applying the State's new "flow from" concept, would restrict the Districts to addressing the management goals listed in the statewide habitat policies for each type of habitat. So, for example, if a statewide standard only listed nutrients and water flow as management goals for wetlands, a District would not be able to develop a policy for an issue addressing elements that may important to waterfowl or fish that use the for feeding or breeding purposes. Commenters were also concerned that they would be limited in establishing and applying policies for designated habitat, and particularly important habitat areas, and that new information requirements for substantiating an area qualified as an important habitat are difficult, rigid, and prohibitive. Commenters strongly urged NOAA to evaluate the ability of other state

agencies to address habitat issues, especially in light of the Alaska Office of Habitat and Management and Permitting's limited authority through two very narrow statutes.

Energy: Commenters stated that the requirement to designate energy areas before district policies can be developed is not feasible, since the state can not expect districts to know where suitable oil and gas potential sites exist (this type of exploratory information from the industries is restricted).

Mining: A majority of commenters stated that the removal of mining standards from the ACMP needed to be analyzed in the EIS for its impact to coastal resources. Commenters were concerned that mining projects will have adverse effects to Native allotments, corporation lands, destruction of habitat and rearing areas for fish and wildlife resources, and traditional fish camps downriver of a project, including drinking water used by rural residents. One commenter pointed out that by removing mining, Districts who's current, existing plans now specifically addressed mining would lose their most important tool for reducing impacts to their coastal resources from mining.

Avoid or Minimize/Lack of Mitigation: Several commenters were concerned at the revision to the mitigation requirement in the state's coastal standards. For example, they stated that not including a mitigation provision under the subsistence standard because "it would never be allowed" is disingenuous, because clearly development projects will be allowed that will have impacts to subsistence, and mitigation would be appropriate and merited, and should be required. Numerous commenters recommended analyzing how the application of the "flow from" concept will limit Districts' ability to establish an enforceable policy for subsistence, utility routes and facilities, transportation routes and facilities, and habitat standards. The issue, as they explained it, is that since the statewide standards will "avoid or minimize" impacts, Districts are now being restricted by DNR under the "flow from" concept to only writing "allow or disallow" enforceable policies for these uses. Apparently comments on draft plans by DNR state that the 'avoid or minimize' clause in the state standard adequately addresses most issues, and that districts could only 'allow or disallow' a use. Commenters suggested NOAA analyze the impact of the loss of the mitigation requirements in District policies, since they felt the state would seldom, if ever require mitigation.

Juneau expressed concern that due to the revisions to the state standards, revised regulations, and the new interpretation that does not allow local policies to use the terms "avoid, minimize, or mitigate," it will lose its Juneau Wetlands Management Plan. As they stated, "[a] wetlands plan cannot be implemented through the program without these terms.

State Implementation of New Standards and Guidance—"Flow From": Many commenters expressed concerns that the State been misinterpreting the legislative intent of the new laws and regulation through the development of guidance, and new concepts, including "flow from," "adequately addressed," etc. Some Districts have provided examples of the comments they received from DNR based on new District Plans they have attempted to develop under the new standards and guidance, particularly on policies that do not "flow from" the statewide standard. Commenters request in general that NOAA analyze how the changes to statewide standards and related changes will improve or decrease coastal protection for specific resources and uses, and if

coastal protections will be weakened; how and to what extent will they be weakened; and what state laws exist to attempt to fill this management void. They suggested that the analysis include an in-depth comparison of former and new statewide standards and an analysis of impacts of weakened standards on coastal resources and uses. Concern was expressed that some policies will now only have substance through local coastal district plans, since there are no implementing authorities at the state level; e.g., subsistence and recreation. In addition, the commenter pointed out that they have been having difficulty getting any enforceable policies approved for these two areas.

Limitations of New District Guidelines: A large number of comments were received on the potential impacts related to the new District Plan Guidelines. Several sets of comments stated that the regulations will weaken the statewide standards, and narrow the geographic coverage of the ACMP. Commenters stated that the regulations greatly limit the ability of coastal districts to develop enforceable policies under the ACMP. They felt that the regulations for crafting policies are complex, multi-layered, and have had ever-changing, unclear interpretations that “strain common English usage and lack common sense.” There was a strong sense that the guidance and standards developed by DNR are in conflict with the objectives of the ACMP as outlined in AS 46.40.020 and national policy objectives identified in Section 303 of the Federal CZMA, as well as the stated purpose of Article 10 of the AK Constitution—to provide for maximum local self-government. As an example, commenters cited how Districts may only establish habitat policies for areas they designate as “important habitat.” The commenters ask NOAA to analyze the impacts to coastal resources of the loss of local district’s ability to negotiate with an applicant to find project-specific solutions to issues of concern re: development. Furthermore, they asked NOAA to analyze how the following concepts will limit district policy development and affect resource management: “flow from,” “adequately addressed,” “stringent versus specific,” avoid, minimize, and mitigate.

Reliance on Local Authorities: Commenters requested NOAA analyze the impacts to resources and the proposed purposes of the EIS if local communities potentially develop their own local zoning or other rules or ordinances outside the ACMP process, and how such piecemeal regulation across the state will affect the timing and effectiveness of permitting decisions and coastal resource protection. It was asserted that the State is encouraging local governments to replace enforceable policies with powers exercised under their Title 29 and/or home rule powers, and that this will result in an added layer of review for applicants, the potential for conflicting requirements, and the potential for delays in project approvals. One commenter was unsure if they have the ability to designate areas such as important habitat areas since they lack borough status as well as Title 29 authority because they are in a CRSA area. They pointed out that the State was unable to provide an answer to this question, and that this could potentially result in significant consequences for vast areas of the coast located in unorganized areas of the state. They stated that previously, policies had blanket applicability through the district and could be considered during federal activities. Commenters also asked that NOAA review the impact of the state implementing these new standards and guidance, including the potential for some Districts withdrawing from the program entirely, indicating that this has already happened in a couple of cases.

Consistency Review: Several commenters felt that as a result of the policy changes Districts will lose their “seat at the table” during federal and state decision making for certain projects that could impact critically important coastal resources and uses. They also doubted their future ability to participate effectively. Another major impact commenters felt should be analyzed is the impact to coastal resources of broadening the list of ABC projects so that fewer projects undergo ACMP reviews. Commenters also felt NOAA should analyze the impacts of the new 90-day limit for consistency reviews on coastal resources and the opportunity for public review), as well as the effects of limiting/restricting reviews to activities occurring within the coastal zone (rather than to a broader set of impacts from projects outside the coastal, but still having impacts on coastal resources).

Review of Projects Outside the Coastal Boundary: Some commenters asked NOAA to quantify the impacts of projects that are outside the coastal boundary that, as a result of the ACMP amendment, now won’t be reviewed for consistency, even if they will have significant impacts to coastal resources and uses.

OCS Review: Commenters stated that the EIS should include a complete analysis of how state OCS reviews would occur and what environmental effects might occur without district policies and district participation in the process. Much of this was related to the DEC carveout, which the commenters felt will remove District’s ability to write any policies on water and air under the DEC carve out, even though the DEC does not have state authority over OCS activities. It was recommended that the EIS analyze how the proposed ACMP changes improve/decrease the State’s ability to protect and manage coastal resources from OCS activities.

Cumulative Impacts: Several commenters offered suggestions for cumulative impacts that should be included in the Impacts analysis. These included consideration of cumulative impacts of changes to the statewide standards and the limits of district enforceable policies that may appear minimal, but cumulative could have significant effects on the future of Alaska’s coastal communities. Another suggestion was to take into consideration the findings of the National Research Council report on the Cumulative Environmental Effects of Oil and Gas Activities on Alaska’s North Slope. Finally, one commenter suggested that if the State amendments are allowed as proposed, cultural loss and adverse effects on community well-being could be irrevocably added to already distressed communities. Since subsistence practices and the culture based on it have been demonstrated to be key to community resiliency, they recommended analyzing the cumulative impacts of any negative effects from the program changes to subsistence.

Environmental Justice Issues: Commenters have raised several Environmental Justice issues that they believe should be analyzed as part of the EIS process. First, they believe that the State’s action limiting testimony on the public hearings for the ACMP program submission to communities with legislative information offices placed rural coast residents, who are largely Native, at a significant disadvantage, and effectively froze them out of the review process. In addition, they felt that non-hub Native villages have not been consulted in a manner that has informed them of the exact nature of the changed or how the changes could affect their communities. There were comments that the State expedited the process within adequate tribal consultation. Several commenters stated that the inability of districts to develop meaningful

enforceable policies, and other changes to the ACMP disproportionately affect Alaska Native communities vis-a-vis the changes that the State proposes to subsistence. Commenters recommend that the impacts to Native people should include a comparison of project effects in areas with local government and in areas outside of organized municipalities (i.e. coastal resource service areas). In general commenters recommend that NOAA analyze the impacts on Alaska Native cultures, communities, lifeways, resources and economies from the proposed ACMP changes, including, but not limited to how changes in the statewide subsistence standard will affect Tribal resources and uses. It was noted that ultimately, the effects of industrial developments will fall disproportionately on Native people in rural Alaska.

NEPA Mitigation Requirements: One commenter stated that if NOAA approves the ACMP amendments, the EIS should provide measures to mitigate the adverse impacts to the natural and human resources that would result from this action.